

# **Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases**

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## Summary

The powers of Congress begin and end with the Constitution. The Constitution vests Congress with explicit authority to enact criminal laws relating to counterfeiting, piracy, crimes on the high seas, offenses against the law of nations, and treason. It grants Congress other broad powers, such as the power to regulate interstate commerce. The Constitution's Necessary and Proper Clause allows Congress to enact criminal laws when reasonably related to the regulation of commerce or to one of the other constitutionally enumerated powers. The Constitution also imposes limits on the powers of Congress, however. It places those limits in the terms it uses in its grants of authority, in explicit prohibitions, and in the Tenth Amendment reminder of the restrictions implicit in the federal union. Recently, the Supreme Court and the lower federal appellate courts have supplied several examples of the scope and limits of congressional authority.

In the case of the Commerce Clause, seven Justices of the Supreme Court endorsed separate opinions in *National Federation* explaining that the power to regulate interstate commerce does not include the power to require participation in commerce. The Fifth Circuit held in *Kebodeaux* that the Commerce Clause does not embody the power to outlaw purely intrastate movement with only an attenuated nexus to commercial activity. As for foreign commerce, the circuits disagree on whether Congress's regulatory authority is subject to the same constraints that apply to its powers over domestic commerce. The Ninth Circuit (*Clark*) believes it is not. The Third Circuit (*Pendleton*) disagrees. (The Violence Against Women Reauthorization Act, P.L. 113-4 (S. 47), eliminates the need to prove a foreign commerce element in the law that gave rise to the circuit split.)

In the realm of the Necessary and Proper Clause, the Eleventh Circuit in *Belfast* observed that Congress may pass criminal legislation in order to implement a treaty obligation, and the Third Circuit in *Bond* held that it may do so without regard to federalism concerns. Moreover, the Ninth Circuit Court of Appeals concluded in *Elk Shoulder* that Congress may outlaw the unregistered movement within a state of a federally convicted sex offender who is on supervised release. The Fifth Circuit held in *Kebodeaux*, however, that the Clause does not permit enactment of a statute that outlaws such movement after the offender has been fully discharged. Although they did not join in a single opinion, seven Justices in *National Federation* concluded that Congress's power under the Spending Clause may not be used to compel the states to accept expansion of a federal regulatory regime or to face draconian economic consequences. The case did not involve criminal penalties, but a limit on Congress's Spending Clause power is a limit on its authority to enact implementing necessary and proper criminal legislation.

Article I, Section 8, clause 10 grants Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Federal appellate courts have looked to customary international law for explanations of the power over offenses against the law of nations (*Bellaizac-Hurtado*) and piracy (*Dire*). The High Seas cases (*Saac* and *Ibarguen-Mosquera*) continue to acknowledge congressional authority to outlaw drug trafficking in international waters subject only to an elusive due process limitation. The Constitution's Military Clauses permit Congress to criminalize overseas assaults by Defense Department foreign contractors (*Brehm*), but do not permit it to punish an individual's conduct based solely on his status as a former member of the Armed Forces even when supplemented by the Necessary and Proper Clause (*Kebodeaux*).

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## Introduction

The federal government is a creature of the Constitution.<sup>1</sup> It enjoys no authority that cannot be traced back to the Constitution. This is as true of Congress as of the other branches.<sup>2</sup> Although the Constitution grants Congress extensive legislative powers,<sup>3</sup> it vests Congress with explicit authority to enact criminal law in only three places. Article I, Section 8, clause 6 states that “Congress shall have Power ... To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.” A few lines later, the Constitution gives Congress authority over three additional classes of crime, when it declares that “Congress shall have Power ... To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”<sup>4</sup> Finally, the Constitution defines the crime of treason, but empowers Congress to set its punishment.<sup>5</sup>

A casual reader might conclude that Congress may enact no other class of criminal statutes. After all, the Tenth Amendment denies Congress any authority that the Constitution does not grant it.<sup>6</sup> Upon closer examination, however, it becomes clear that the Constitution elsewhere gives Congress, the President, and the federal courts sweeping powers. Moreover, the authority it places in the hands of Congress includes an implementing power, that is, the authority to enact laws necessary and proper to the implementation of those other powers—authority that by implication includes the authority to enact reasonably related criminal laws.<sup>7</sup>

Nevertheless, Congress’s criminal law enacting powers are not boundless. Some limitations reside with the grant of authority. Article III, for example, allows Congress to set the punishment for treason, but denies it permission to punish treason with corruption of the blood.<sup>8</sup> The Constitution mentions other limitations in areas apart from its grants of authority, like the prohibition on ex post facto laws or abridgement of freedom of speech.<sup>9</sup> The third class of limitations is more difficult to discern. Whether understood as contextual, or structural, or implicit in the Tenth Amendment, they are the limitations of federalism, the limitations that flow from the fact the Constitution emerged as a compact between the sovereign it created and the sovereigns that created it.<sup>10</sup>

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<sup>1</sup> *Reid v. Covert*, 354 U.S. 1, 5-6 (1957)(Black, J. with Warrant, Ch.J., Douglas and Brennan, JJ.)(opinion and announcing the judgment of the court)(“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution”).

<sup>2</sup> *United States v. Morrison*, 529 U.S. 598, 607 (2000)(“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution”).

<sup>3</sup> U.S. Const. Art. I, §1 (All legislative Powers herein granted shall be vested in a Congress of the United States ...”).

<sup>4</sup> U.S. Const. Art. I, §8, cl. 10.

<sup>5</sup> U.S. Const. Art. III, §3.

<sup>6</sup> U.S. Const. Amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

<sup>7</sup> U.S. Const. Art. I, §8, cl. 18.

<sup>8</sup> U.S. Const. Art. III, §3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted”).

<sup>9</sup> U.S. Const. Art. I, §9, cl. 3; Amend. I.

<sup>10</sup> See generally CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

What follows is a discussion of selected recent cases that illustrate the scope and boundaries of Congress's power to enact criminal laws under the Constitution's necessary and proper, commerce, high seas, law of nations, spending, and military clauses.

## Necessary and Proper Clause

The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, all other Powers vested by this Constitution in the Government of the United State, or in any Department or Officer there.<sup>11</sup>

“[T]he Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient or useful’ or ‘conductive’ to the authority’s ‘beneficial exercise.’”<sup>12</sup> The phrase “necessary and proper” does not demand absolute necessity.<sup>13</sup> It is enough that a statute is rationally related to the constitutional power it seeks to “carry into execution.”<sup>14</sup>

The Supreme Court’s *Comstock* decision offered an expansive view of the Necessary and Proper Clause, with caveats. Two Sex Offender Registration and Notification Act (SORNA) cases, *Kebodeaux* and *Elk Shoulder*,<sup>15</sup> treat the caveats and thus the scope of the Clause very differently. Two other recent appellate decisions, *Bond* and *Belfast*,<sup>16</sup> raise questions of the Tenth Amendment limits, if any, on congressional authority under the Clause. The Supreme Court has granted certiorari in *Bond* and *Kebodeaux*.

### *United States v. Comstock*

The Supreme Court in *Comstock* stated that a statute that relies on the Necessary and Proper Clause need not always be but one step removed from the constitutional power it brings to life.<sup>17</sup> *Comstock* and his fellow petitioners challenged the constitutional underpinning of 18 U.S.C. 4248. Section 4248 authorizes federal courts to order the civil commitment of federal inmates whose release is imminent on the grounds that the prisoners are mentally ill and sexually dangerous.

The Court did not rule upon whether Section 4248 was a necessary and proper means of carrying into execution the Commerce Clause pursuant to which the statute of *Comstock*’s conviction had been enacted. Instead of reference to the Commerce Clause, it began with the observation that, other than in the case of piracy and other constitutionally identified crimes, the enactment of criminal statutes generally occurs by operation of the Necessary and Proper Clause. It then identified the links in the chain that began with the constitutional authority to enact criminal laws and ended with Section 4248. Section 4248, it held, “is a ‘necessary and proper’ means of

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<sup>11</sup> U.S. Const. Art. I, §8, cl. 18.

<sup>12</sup> *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010), quoting, *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

<sup>13</sup> *Jinks v. Richland County*, 538 U.S. 456, 462 (2003), citing, *McCulloch v. Maryland*, 4 Wheat. [(17 U.S.)] at 414-15.

<sup>14</sup> *United States v. Comstock*, 130 S.Ct. at 1956-957, citing inter alia, *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

<sup>15</sup> *United States v. Kebodeaux*, 687 F.3d 232 (5<sup>th</sup> Cir. 2012), cert. granted, 133 S.Ct. 928 (2013); and *United States v. Elk Shoulder*, 696 F.3d 922 (9<sup>th</sup> Cir. 2012).

<sup>16</sup> *United States v. Bond*, 681 F.3d 149, 159 (3d Cir. 2012), cert. granted 133 S.Ct. 978 (2013); and *United States v. Belfast*, 611 F.3d 783 (11<sup>th</sup> Cir. 2010).

<sup>17</sup> *United States v. Comstock*, 130 S.Ct. at 1964; see generally CRS Report R40958, *United States v. Comstock: Legislative Authority Under the Necessary and Proper Clause*, by Charles Doyle.

exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.”<sup>18</sup>

The *Comstock* Court confirmed, however, that a statute cannot be “proper” if it is constitutionally prohibited or inconsistent with the letter or spirit of the Constitution.<sup>19</sup> The Court listed five considerations upon which its decision was predicated. Although it did not say so, the implication is that without the five, the Court might have found Section 4248 inconsistent with the spirit of federalism that permeates the Constitution. The five were

(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in arena [of the mental health of federal prisoners], (3) the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody; (4) the statute’s accommodation of state interests [e.g., the statute demands that federal custody of the committed inmate be surrendered when the appropriate state expresses a willingness to assume responsibility], and (5) the statute’s narrow scope.<sup>20</sup>

## SORNA Cases

The United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit read the *Comstock* five considerations differently. The Fifth Circuit, sitting en banc in *United States v. Kebodeaux*,<sup>21</sup> applied the considerations and found the Necessary and Proper Clause insufficient to support the application of the Sex Offender Registration and Notification Act (SORNA) to a fully discharged federal sex offender. The Ninth Circuit, in *United States v. Elk Shoulder*,<sup>22</sup> applied the same considerations and came to opposite conclusions in the case of a federal sex offender still under supervised release.

While a 21-year-old soldier, Kebodeaux was court martialed for engaging in consensual sex with a 15-year-old.<sup>23</sup> Some years after his release and discharge, Congress enacted SORNA, which required federal sex offenders to register with state authorities and to maintain the currency of their registrations.<sup>24</sup> Shortly thereafter, the Attorney General exercised his statutory authority to impose the obligation upon those who had been convicted of federal offenses prior to SORNA’s passage.<sup>25</sup> Then, Kebodeaux moved from El Paso to San Antonio within the state of Texas

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<sup>18</sup> *United States v. Comstock*, 130 S.Ct. at 1965.

<sup>19</sup> *Id.* at 1956, again quoting, *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) at 316 (emphasis added)(“Let the end be legitimate, let it be within the scope of the constitution, and all means are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional”).

<sup>20</sup> *United States v. Comstock*, 130 S.Ct. at 1965.

<sup>21</sup> *United States v. Kebodeaux*, 687 F.3d 232 (5<sup>th</sup> Cir. 2012), cert. granted, 133 S.Ct. 928 (2013); see also CRS Legal Sidebar WSLG198, *Fifth Circuit Overturns Federal Sex Offender Registration Conviction as Beyond Congress’ Legislative Power*.

<sup>22</sup> *United States v. Elk Shoulder*, 696 F.3d 922 (9<sup>th</sup> Cir. 2012).

<sup>23</sup> *United States v. Kebodeaux*, 687 F.3d at 234.

<sup>24</sup> P.L. 109-248 (2006), codified at 42 U.S.C. 16901 to 16991 and 18 U.S.C. 2250.

<sup>25</sup> 28 C.F.R. pt. 72, pursuant to 42 U.S.C. 16913(d).

without reporting his relocation to state authorities.<sup>26</sup> He was convicted under 18 U.S.C. 2250(a) for the failure.<sup>27</sup>

Elk Shoulder was convicted of sexually abusing a six-year-old within the territorial jurisdiction of the United States in violation of 18 U.S.C. 2241(c).<sup>28</sup> He had been released from prison, but was on supervised release when SORNA was enacted.<sup>29</sup> He moved from place to place in Montana, but never registered and was subsequently convicted under 18 U.S.C. 2250(a) for the failure.<sup>30</sup>

Both Circuits agreed that the *Comstock* decision provides the proper mode of analysis for challenges grounded in the Necessary and Proper Clause.<sup>31</sup> Their respective views of the *Comstock* considerations differ dramatically thereafter. First, the Fifth Circuit conceded that the Necessary and Proper Clause vests Congress with broad authority.<sup>32</sup> The Ninth Circuit went a step further and concluded that “SORNA was rationally related to an enumerated power” (the power to enact legislation governing activities within the territorial jurisdiction of the United States).<sup>33</sup>

Second, the *Comstock* Court noted that the civil commitment statute at issue was “a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades.”<sup>34</sup> The Ninth Circuit stated that in like manner SORNA was a modest addition to the federal parole, probation, and supervised release laws that date back to 1910. SORNA and those provisions both deal with the post-incarceration supervision.<sup>35</sup> The Fifth Circuit found SORNA historically novel.<sup>36</sup> It found the probation-supervised release analogy wanting because, unlike SORNA, both probation and supervised release are part of the punishment for the original federal

<sup>26</sup> *United States v. Kebodeaux*, 687 F.3d at 234.

<sup>27</sup> 18 U.S.C. 2250(a) provides in pertinent part: “Whoever ... (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under ... the Uniform Code of Military Justice ... and (3) knowingly fails to ... update a registration as required by the ... Act; shall be fined under this title or imprisoned not more than 10 years, or both.”

<sup>28</sup> *United States v. Elk Shoulder*, 696 F.3d at 924.

<sup>29</sup> *Id.* at 931 n.10.

<sup>30</sup> *Id.* at 925.

<sup>31</sup> *United States v. Kebodeaux*, 687 F.3d at 236 (“Kebodeaux argues that Congress has no authority under Article I to subject him to conviction pursuant to §2250(a)(2)(A).... The most analogous Supreme Court decision is *United States v. Comstock*”); *United States v. Elk Shoulder*, 696 F.3d at 928 (“The Supreme Court provided a framework for analyzing such arguments in *United States v. Comstock*”).

<sup>32</sup> *United States v. Kebodeaux*, 687 F.3d at 236–37 (“First, the *Comstock* Court explained ... that Congress has broad authority to enact legislation under the Necessary and Proper Clause. Thus, to be constitutional under that clause, a statute must constitute a means that is ‘rationally related’ or ‘reasonably adapted’ to an enumerated power. Congress has ‘a large discretion’ as to the choice of means, and we apply a ‘presumption of constitutionality’ to its enactments. This first factor is not fact-specific; it suggests that the analysis always starts with a heavy thumb on the scale in favor of upholding government action”).

<sup>33</sup> *United States v. Elk Shoulder*, 696 F.3d at 930.

<sup>34</sup> *United States v. Comstock*, 130 S.Ct. 1958; see also *id.* at 1961 (“Aside from its specific focus on sexually dangerous persons, §4248 is similar to the provisions first enacted in 1949. Cf. §4246 [relating to the pre-release civil commitment of federal prisoners for mental health reasons]. In that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855”).

<sup>35</sup> *United States v. Elk Shoulder*, 696 F.3d at 929 (“Requiring sex offenders to register and update their addresses is a ‘modest’ addition to the federal government’s long history of regulating federal offenders after their release from incarceration through probation, parole and supervised release”).

<sup>36</sup> *United States v. Kebodeaux*, 687 F.3d at 238 (“The Department of Justice cannot find a single authority, from more than two hundred years of precedent, for the proposition that it can reassert jurisdiction over someone it had long ago unconditionally released from custody just because he once committed a federal crime. Thus, SORNA’s registration requirements for federal sex offenders are constitutionally novel”).



offense crime.<sup>37</sup> Although failure to comply is a crime, SORNA's registration demands are not considered punitive.<sup>38</sup> Moreover, SORNA did not exist until long after Kebodeaux had served his sentence.

In its third consideration, the *Comstock* Court highlighted the sound policy reasons for the statute's enactment (protection of the public from those in federal custody).<sup>39</sup> In the mind of the Ninth Circuit, the *Comstock* statute authorized civil commitment to protect the public from federal sex offenders, while SORNA required registration to protect the public from federal sex offenders. Both were reasonably adapted to a legitimate end.<sup>40</sup> The Fifth Circuit disagreed. It believed that custodial responsibility for those soon to be released differs from custodial responsibility for those released long ago. The difference prevented the Fifth Circuit from classifying SORNA's application to Kebodeaux as reasonably related to a constitutional power.<sup>41</sup>

The Fourth *Comstock* consideration is the accommodation of state interest. The *Comstock* statute allowed the appropriate state to assume jurisdiction over soon-be-released prisoners whom federal authorities would otherwise subject to federal civil commitment.<sup>42</sup> The Ninth Circuit found at least equivalent accommodation in SORNA.<sup>43</sup> It does not supplant the state systems.<sup>44</sup> Its criminal penalties only apply with respect to state sex offenders who travel in interstate commerce or to federal sex offenders.<sup>45</sup> Its encouragement of state acceptance of federal standards is modest.<sup>46</sup> The Fifth Circuit, on the other hand, viewed SORNA as less

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<sup>37</sup> *Id.* ("There is, however, a big difference between SORA's sex-offender-registration requirements and probation or supervised release—a distinction that goes to the heart of this case. Unlike the situation involving probation or supervised release, SORNA's ex-offender-registration requirements (and §2250(a)(2)(A)'s penalties) were not a condition of Kebodeaux's release from prison, let alone a punishment for his crime").

<sup>38</sup> *Id.*

<sup>39</sup> *United States v. Comstock*, 130 S.Ct. at 1961.

<sup>40</sup> *United States v. Elk Shoulder*, 696 F.3d at 929 (internal citations omitted) ("Comstock held that the civil commitment statute at issue was reasonably adapted to its ends. Among other things, Congress could have reasonably concluded that federal inmates who suffer from mental illness that causes them to have serious difficulty in refraining from sexually violent conduct, would pose an especially high danger to the public if released. Here, Congress's decision to enact SORNA to enhance public safety by imposing a registration requirement on convicted federal sex offenders and criminalizing the failure to register, is also reasonable adopted to the attainment of a legitimate end, namely to protect the public from sex offenders and offenders against children").

<sup>41</sup> *United States v. Kebodeaux*, 687 F.3d at 242-43 ("In sum, as applied to Kebodeaux, SORNA's registration requirements are not, and cannot be, an attempt to ... act as a responsible custodian of prisoners; they are merely an effort to protect the public from those who may be dangerous because they once were convicted of a sex offense. By that logic, Congress would have never ending jurisdiction to regulate anyone who was ever convicted of a federal crime of any sort, no matter how long ago, he served his sentence, because he may pose a risk of re-offending. Indeed, that logic could easily be extended beyond federal crimes: Congress could regulate a person who once engaged in interstate commerce (and was thereby subject to federal jurisdiction) on the grounds that he now poses a risk of engaging interstate commerce again. In short, the only 'rational relation' between §2250(a)(2)(A)'s application to Kebodeaux and an enumerated federal power is that Kebodeaux was once subject to federal jurisdiction—reasoning that is so expansive that it would put an end to meaningful limits on federal power").

<sup>42</sup> *United States v. Comstock*, 130 S.Ct. at 1962.

<sup>43</sup> *United States v. Elk Shoulder*, 696 F.3d at 930 ("SORNA likewise reasonably accommodates state interests").

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; 18 U.S.C. 2250(a).

<sup>46</sup> *United States v. Elk Shoulder*, 696 F.3d at 930 ("SORNA's requirement that states implement SORNA-compliant registration and notifications systems in order to receive certain funds, see 42 U.S.C. 16925, does not improperly invade state interests").



accommodating than the *Comstock* statute. Unlike the *Comstock* statute, SORNA gives state authorities no option to substitute state discretion for that of federal authorities.<sup>47</sup>

Finally, the *Comstock* Court observed that the regulatory scheme under consideration was neither too remote from the enumerated power upon which it relied nor too sweeping in scope.<sup>48</sup> The same could be said of SORNA, the Ninth Circuit asserted.<sup>49</sup> Again, the Fifth Circuit took a different view: the government’s rationale in defense of SORNA—that federal conviction vests Congress with boundless, timeless legislative authority over the individual—“is anything but narrow.”<sup>50</sup>

The Fifth Circuit concluded that SORNA, as applied to Kebodeaux, failed to satisfy the *Comstock* considerations and consequently exceeded Congress’s authority under the Necessary and Proper Clause.<sup>51</sup> The Ninth Circuit, writing after the Fifth Circuit’s opinion had been announced, explicitly disagreed with it: “Because we reject the Fifth Circuit’s conclusion that Congress cannot ‘reassert jurisdiction over someone it had long ago unconditionally released from custody,’ a proposition for which the Fifth Circuit provided no support, we disagree with its analysis of the *Comstock* considerations, which is based almost exclusively on that conclusion.”<sup>52</sup>

## *United States v. Bond*

The *Bond* decision addressed the question of whether structural, federalism concerns limit congressional authority under the Necessary and Proper Clause to enact treaty implementing legislation. Mrs. Bond sought revenge against her husband’s paramour by coating the woman’s car door handles and door knobs with toxic chemicals. Mrs. Bond was convicted of using a chemical weapon in violation of the Chemical Weapons Implementation Act.<sup>53</sup> She argued on

<sup>47</sup> *United States v. Kebodeaux*, 687 F.3d at 243-44 (“Here, [in contrast to the *Comstock* statute], there is no provision by which someone federally prosecuted under SORNA can be subjected to state penalties or transferred to state custody instead. Unless a former federal sex offender proves that a state has made it impossible for him to register, he is subject to federal prosecution and up to ten years of imprisonment for failing to update his state registration within three days of a change of address, employment, name, or student status, even if the state believes a more moderate response would be appropriate (which Texas and many other states apparently do). The state is thus forced into the binary choice of keeping a former federal sex offender off its own registry entirely or subjecting him to §2250(a)(2)(A)’s harsh penalties; it cannot control the punishment given to those who fail to update their registration”).

<sup>48</sup> *United States v. Comstock*, 130 S.Ct. at 1963.

<sup>49</sup> *United States v. Elk Shoulder*, 696 F.3d at 930-31 (“Here, the links between Congress’s enumerated powers and SORNA are no more attenuated than those in *Comstock*. It is a small step from Congress’s power to enact laws, criminalize their violation, place the violators in custody, and protect the public from federal convicts even after release, see [*Comstock*] at 1964-65, to requiring federal convicts who may be dangerous to the public to provide information regarding their residence, and punishing those who fail to do so.... The SORNA registration requirements are likewise not ‘too sweeping in scope.’ Contrary to Elk Shoulder’s assertion that authorization of lifelong registration requirements would grant a ‘general police power’ to Congress, the requirement to register is not nearly as significant a burden as the indefinite detention authorized in *Comstock*”).

<sup>50</sup> *United States v. Kebodeaux*, 687 F.3d at 245 (SORNA’s “logic is expansive, because the only jurisdictional basis for §2250(a)(2)(A) is the fact that a person once committed a federal crime. That reasoning opens the door ... to congressional power over anyone who was ever convicted of a federal crime of any sort. That is anything but narrow”).

<sup>51</sup> *Id.* (“The statute’s regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not ‘reasonably adapted’ to the government’s custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states’ sovereign interest over what intrastate conduct to criminalize within its own borders, and (4) is sweeping in the scope of its reasoning”).

<sup>52</sup> *United States v. Elk Shoulder*, 696 F.3d 922, 932 (9th Cir. 2012) (internal citations omitted).

<sup>53</sup> 18 U.S.C. 229.

appeal that either the statute did not apply to her conduct or that Congress lacked the constitutional authority to enact legislation that swept into federal court a local “run of the mill” assault case, like her own. The Third Circuit Court of Appeals initially held that Mrs. Bond had no standing to challenge her conviction on federalism grounds, maintaining that only a state could object to intrusion upon its sovereign prerogatives.<sup>54</sup> The Supreme Court reversed. Mrs. Bond may claim the benefits of federalism, since it “secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>55</sup>

When the case returned to the Third Circuit for a decision on the merits, the court was faced with the question of the extent to which principles of federalism limit congressional authority under the Necessary and Proper Clause to implement a United States treaty. The Supreme Court appeared to have provided the answer in *Missouri v. Holland*. There, in the face of a federalism objection, the Court declared that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.”<sup>56</sup>

In theory, a treaty may be invalid in three ways. First, it may exceed the authority granted in the Treaty Power. Second, it may exceed an express limitation that appears elsewhere in the Constitution. Finally, it may exceed an implicit constitutional limitation. As to the first, the *Holland* Court considered the Migratory Bird Treaty subject matter properly attributed to the Treaty Power: it constituted a matter of national concern that could “be protected only by national action in concert with that of another power.”<sup>57</sup> Second, the Migratory Bird Treaty “[did] not contravene any prohibitory words to be found in the Constitution.”<sup>58</sup> Therefore, “[t]he only question [was] whether [the Migratory Bird Treaty was] forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>59</sup>

The *Holland* Court answered this last question by comparing the strength of the competing state and federal claims. Missouri’s claim rested on a “slender reed. Wild birds are not in possession of anyone; and possession is the beginning of ownership. The whole foundation of the State’s rights is the presence within [its] jurisdiction of birds that yesterday had not arrived; tomorrow may be in another State and in a week a thousand miles away.”<sup>60</sup>

The federal interest, on the other hand, was substantial:

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of [the] opinion that the treaty and statute must be upheld.<sup>61</sup>

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<sup>54</sup> *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009).

<sup>55</sup> *United States v. Bond*, 131 S.Ct. 2355, 2364 (2011), quoting, *New York v. United States*, 505 U.S. 144, 181 (1992).

<sup>56</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>57</sup> *Id.* at 434.

<sup>58</sup> *Id.* at 433.

<sup>59</sup> *Id.* at 433-34.

<sup>60</sup> *Id.* at 434.

<sup>61</sup> *Id.* at 435.

In the Third Circuit upon return, Mrs. Bond conceded the validity of the Chemical Weapons Convention.<sup>62</sup> She argued instead that the Constitution imposes explicit and implicit limits on congressional authority under the Necessary and Proper Clause.<sup>63</sup> “The problem with [Mrs.] Bond’s attack,” in the eyes of the Third Circuit, was “that, with practically no qualifying language in *Holland* to turn to” the court was “bound to take at face value the Supreme Court’s statement that ‘[i]f the treaty is valid there can be no dispute about the validity of the statute ... as a necessary and proper means to execute the powers of the Government.’”<sup>64</sup> Nor was the court convinced that the implementing statute “disrupts the balance of power between the federal government and the states,”<sup>65</sup> the argument at the heart of Mrs. Bond’s challenge.

The court was not unsympathetic to Mrs. Bond’s contention that her case did not belong in federal court: Mrs. “Bond’s prosecution seems a questionable exercise of prosecutorial discretion, [The decision to use the Act—a statute designed to implement a chemical weapons treaty—to deal with a jilted spouse’s revenge on her rival is, to be polite, a puzzling use of the federal government’s power], and indeed appears to justify her assertion that this case ‘trivializes the concept of chemical weapons.’”<sup>66</sup> A concurring member of the panel was even more critical and expressed the hope that the Supreme Court would accept the case for review.<sup>67</sup> The Court has done so.<sup>68</sup>

## *United States v. Belfast*

The *Belfast* decision addressed the question of whether due process limits Congress’s treaty implementing authority. The United States District Court for the Southern District of Florida convicted Belfast of overseas violations of the Torture Act, a statute enacted to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>69</sup> Belfast argued that the Torture Act exceeded congressional authority under the Treaty Power and Necessary and Proper Clauses, because it outlawed conspiracy when the Convention did not mention and because the statute included a more sweeping definition of torture.<sup>70</sup> On appeal, the Eleventh Circuit Court of Appeals concluded that “[a]pplying the [Necessary and Proper Clause’s] rational relationship test in this case, we are satisfied that the Torture Act is a

<sup>62</sup> *United States v. Bond*, 681 F.3d 149, 159 (3d Cir. 2012), cert. granted 133 S.Ct. 978 (2013).

<sup>63</sup> *Id.* at 162.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 166.

<sup>66</sup> *Id.* at 165 (footnote 20 of the court’s opinion in brackets).

<sup>67</sup> *Id.* at 170 (Ambro, J. concurring)(internal citations omitted)(“Since *Holland*, Congress has largely resisted testing the outer bounds of its treaty-implementing authority. But if ever there were a statute that did test those limits, it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the-mill criminal conduct. The statute is a troublesome example of the Federal Government’s appetite for criminal lawmaking. Sweeping statutes like Section 229 are in deep tension with an important structural feature of our Government: ‘The States possess primary authority for defining and enforcing the criminal law.’ *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); see also *Patterson v. New York*, 432 U.S. 197, 201 (1977) (‘It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government ... ’). I hope that the Supreme Court will soon flesh out ‘[t]he most important sentence in the most important case about the constitutional law of foreign affairs,’ and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it”).

<sup>68</sup> *Bond v. United States*, 133 S.Ct. 978 (2013).

<sup>69</sup> *United States v. Belfast*, 611 F.3d 783, 793 (11<sup>th</sup> Cir. 2010).

<sup>70</sup> *Id.*

valid exercise of congressional power under the Necessary and Proper Clause, because the Torture Act tracks the provisions of CAT in all material respects.”<sup>71</sup>

Since the violations occurred overseas, the threat to state law enforcement interests was minimal and posed no restriction on congressional authority. Nevertheless, the Constitution confines congressional authority both explicitly<sup>72</sup> and implicitly for the protection of the people of the United States.<sup>73</sup>

Belfast asserted that the absence of CAT ratification by the nation where the torture occurred denied him the notice of its application to him which due process required. The court was unconvinced. It reminded him that “[t]he Supreme Court made clear long ago that an absent United States citizen is nonetheless ‘personally bound to take notice of the laws [of the United States] that are applicable to him and to obey them.’”<sup>74</sup> The issue of structural limitations did not arise.

## Commerce Clause

The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.<sup>75</sup>

### Interstate Commerce

The classic statement of Congress’s legislative power under the Interstate Commerce Clause appears in *United States v. Lopez*,<sup>76</sup> *United States v. Morrison*,<sup>77</sup> and *Gonzales v. Raich*.<sup>78</sup> There the Court points out that the Clause grants Congress authority to enact three classes of statutes. “First, Congress may regulate the use of the channels of interstate commerce,”<sup>79</sup> as it has done when it outlawed the interstate transportation of stolen property or the interstate transportation of kidnap victims.<sup>80</sup> “Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the treat may come only from intrastate activities,”<sup>81</sup> as it has done when it outlawed the destruction of aircraft or the theft of property from interstate shipment.<sup>82</sup> “Finally, Congress’ commerce authority includes the

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<sup>71</sup> *Id.* at 806.

<sup>72</sup> E.g., U.S. Const. Amend. V (“No person shall ... be deprived of life, liberty, or property, without due process of law ...”).

<sup>73</sup> U.S. Const. Amend. X (emphasis added)(“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*”); cf., *United States v. Bond*, 131 S.Ct. 2355, 2364 (2011), quoting, *New York v. United States*, 505 U.S. 144, 181 (1992)(“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power”).

<sup>74</sup> *Id.* at 809, quoting, *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

<sup>75</sup> U.S. Const. Art. I, §8, cl. 3.

<sup>76</sup> 514 U.S. 549 (1995).

<sup>77</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>78</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>79</sup> *United States v. Lopez*, 514 U.S. at 558; *United States v. Morrison*, 529 U.S. at 609; *Gonzales v. Raich*, 545 U.S. at 16.

<sup>80</sup> E.g., 18 U.S.C. 2314 (transportation of stolen property), 1201 (kidnaping).

<sup>81</sup> *United States v. Lopez*, at 558; *United States v. Morrison*, 529 U.S. at 609; *Gonzales v. Raich*, 545 U.S. at 16-7.

<sup>82</sup> 18 U.S.C. 32 (destruction of aircraft), 659 (theft from interstate shipments).

power to regulate those activities having a substantial relation to interstate commerce,”<sup>83</sup> as it has done when it outlaws cultivation and possession of controlled substances.<sup>84</sup>

In *New York v. United States*, the Court noted that Congress could not rely on the Commerce Clause to commandeer the legislative and regulatory processes of the states in order to enforce a federal program for the disposal of radioactive waste. This is no less true when a statute offers the states a choice of two unpalatable alternatives—federal commandeering or taking title to radioactive waste.<sup>85</sup> The Court explained in *Printz v. United States* that by the same token, Congress could claim no Commerce Clause or Necessary and Proper Clause authority to compel state law enforcement officials to conduct background checks on prospective handgun purchasers as part of a federal regulatory program.<sup>86</sup>

Moreover, the Court held in *Lopez* that the Commerce Clause did not empower Congress to enact statutes that outlawed possession of a firearm in a school yard and in *Morrison* that it does not permit creation of a federal cause of action for the victims of violent, gender-based animus. The Clause does not enable any such attempt to regulate activities without a more immediate relation to commerce, particularly if the activities are markedly local.<sup>87</sup> This is not to deny, as the Court acknowledged in *Raich*, that Congress may regulate intrastate activity such as the cultivation and possession of marijuana that has a substantial impact on a class of interstate commercial activity such as the interstate and international traffic in marijuana.

Seven *National Federation of Independent Business* justices found the Patient Protection and Affordable Care Act’s individual mandate more than the Interstate Commerce Clause empowers. The *Kebodeaux* court found the outer reaches of the Sex Offender Registration and Notification Act (SORNA) beyond Congress’s power under the Interstate Commerce Clause as well as the Necessary and Proper Clause.

### ***National Federation of Independent Business v. Sebelius***

A confluence of views, rather than a holding, in *National Federation of Independent Business v. Sebelius*,<sup>88</sup> appears to identify a previously unannounced limitation on the congressional power under the Interstate Commerce Clause: the Clause does not empower Congress to penalize the failure to engage in commerce.

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<sup>83</sup> *United States v. Lopez*, at 558-59; *United States v. Morrison*, 529 U.S. at 609; *Gonzales v. Raich*, 545 U.S. at 17.

<sup>84</sup> E.g., 21 U.S.C. 841, 844.

<sup>85</sup> *New York v. United States*, 505 U.S. 174-77 (1992).

<sup>86</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>87</sup> *United States v. Morrison*, 529 U.S. at 617-18 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States”); *United States v. Lopez*, 514 U.S. at 564 (The Government admits, under its ‘cost of crime’ reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violence crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens.... Under the theories that the Government presents ... it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign”).

<sup>88</sup> *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

The question involved the so-called individual mandate feature of the Patient Protection and Affordable Care Act. The individual mandate, with some exceptions, requires healthy individuals, who might otherwise forgo purchasing health insurance, to obtain insurance or to pay a penalty.<sup>89</sup> The provision is designed to compensate insurers for their required coverage of certain unhealthy individuals.<sup>90</sup> Although a majority of the Court found that the mandate is the valid exercise of Congress's constitutional taxing power,<sup>91</sup> seven Justices—three members of the majority and four dissenters—stated that the Commerce Clause afforded insufficient constitutional authority for its enactment. Chief Justice Roberts, joined by Justices Breyer and Kagan, observed that the power to regulate commerce does not include the power to require individuals to engage in commerce.<sup>92</sup> The four dissenters struck much the same cord when they noted: “The Individual Mandate in the Act commands that every individual shall ... ensure that the individual ... is covered under minimum essential coverage. If this provision ‘regulates’ anything, it is the *failure* to maintain minimum essential coverage.... But that failure—that abstention from commerce—is not ‘Commerce.’ To be sure, *purchasing* insurance is ‘Commerce’; but one does not regulate commerce that does not exist by compelling its existence.”<sup>93</sup> However, the dissenters’ opinion was grounded also on the principle that “Whatever may be the conceptual limits upon the Commerce Clause ... [it] cannot be such as will enable the Federal Government to regulate all private conduct....”<sup>94</sup>

The case did not involve enactment of a criminal statute. However, the scope of the Commerce Clause defines the scope of congressional authority to enact implementing criminal legislation.

<sup>89</sup> 26 U.S.C. 5000A.

<sup>90</sup> *National Federation of Independent Business v. Sebelius*, 132 S.Ct. at 2585 (“By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept”).

<sup>91</sup> *Id.* at 2594-2601.

<sup>92</sup> *Id.* at 2586, 2591 (Roberts, Ch.J., with Breyer and Kagan, JJ.) (emphasis in the original) (“The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.... The individual mandate forces individual into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce’”).

<sup>93</sup> *Id.* at 2644 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (internal citations omitted) (emphasis in the original) and later the four also declared, “It is true enough that Congress needs only a ‘rational basis’ for concluding that the *regulated activity* substantially affects interstate commerce. But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce,” *id.* at 2649.

<sup>94</sup> *Id.* at 2643. The dissenters reiterated the theme throughout: “If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, ‘the hideous monster whose devouring jaws ... spare neither sex nor age, nor high no low, nor sacred nor profane.’ ... The lesson of these cases [*New York, Printz, Lopez*, and *Morrison*] is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.... [*Raich*’s] prohibition of growing and of possession did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not ‘consist[ent] with the letter and spirit of the constitution.’ ... As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept. Section 5000A is defeated by the proposition,” *id.* at 2646, 2646-647, 2647 (internal citations and parentheticals omitted).



### ***United States v. Kebodeaux***

Having concluded that application of SORNA in the case before it exceeded Congress's Necessary and Proper powers, the Fifth Circuit in *Kebodeaux* also rejected the suggestion that SORNA, as applied, might be considered a valid exercise of Congress's Commerce Clause powers under the "channels of commerce," the "instrumentalities of commerce," or the "substantial effect on commerce" prong of the Clause.<sup>95</sup> It held that "Congress lacks the constitutional authority under the 'channels of interstate commerce' to require fully discharged former federal sex offenders to register whenever they relocate within a state, because it risks the use of interstate travel by sex offenders; nor under the protecting the instrumentalities of interstate commerce because sex offenders may pose a risk to interstate traffic if they travel interstate."<sup>96</sup> The Fifth Circuit concluded that the justifications were too sweeping and too intrusive upon state criminal law prerogatives.<sup>97</sup> As for the substantial impact on commerce prong, the Fifth Circuit thought SORNA, as applied, looked too much like the regulation of non-economic activity in *Lopez* and *Morrison* and too little like the regulation of "quintessentially economic activity" in *Raich*.<sup>98</sup>

### **Foreign Commerce**

A disagreement has recently developed in the lower federal appellate courts over whether the *Lopez* Interstate Commerce Clause standards relating to commercial channels, instrumentalities, and effects apply with equal force to the Foreign Commerce Clause. A few years ago, the Ninth Circuit stated that congressional authority under the Foreign Commerce Clause could be defined without reference to the *Lopez* standards.<sup>99</sup> More recently, the Third Circuit expressly questioned that approach.<sup>100</sup> In between, the Second Circuit sidestepped the question with a statutory construction that avoided the constitutional issues,<sup>101</sup> a construction Congress may have had in mind when it expanded a related proscription in reauthorization of the Violence Against Women Act.<sup>102</sup>

<sup>95</sup> *United States v. Kebodeaux*, 687 F.3d at 245-253.

<sup>96</sup> *Id.* at 247.

<sup>97</sup> *Id.* at 249-50 ("The basic flaw [in the government's argument] is that it overlooks the role of the states in policing within their own borders, relying on the implicit premises that the federal government must regulate sex offenders' intrastate movements because the states will not do so.... To give ... to the federal government the overlapping power to do exactly what a state could already do itself, in an area completely unrelated to commerce, just because criminals, like all human beings, can potentially cross state lines, would violate basic tenets of federalism").

<sup>98</sup> *Id.* at 687 F.3d at 252 ("In contrast to the statute in *Raich*, and like the statutes in *Lopez* and *Morrison*, the statute here regulates non-economic, intrastate conduct that is not 'an essential part of a larger regulation of economic activity.' *Lopez*, 514 U.S. at 561. It is a criminal statute that 'by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.' *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 561). It would thus fail the *Lopez/Morrison/Raich* test under the third Commerce Clause category as it should. To hold a non-commercial statute regulating purely intrastate conduct constitutional would read the word 'commerce' out of the Commerce Clause").

<sup>99</sup> *United States v. Clark*, 435 F.3d 1100, 1116 (9<sup>th</sup> Cir. 2006).

<sup>100</sup> *United States v. Pendleton*, 658 F.3d 299, 307-308 (3d Cir. 2011) ("The Government urges us to adopt the Ninth Circuit's approach to the Foreign Commerce Clause. Although we agree with *Clark* that the Interstate Commerce Clause developed to address 'unique federalism concerns' that are absent in the foreign commerce context, we are hesitant to dispose of *Lopez*'s 'time-tested framework' without further guidance from the Supreme Court").

<sup>101</sup> *United States v. Weingarten*, 632 F.3d 60, 71 (2d Cir. 2011).

<sup>102</sup> Section 1211(b), P.L. 113-4, 127 Stat. 142 (2013), amending 18 U.S.C. 2433(c).



### *United States v. Clark*

Clark, an American expatriate, lived in Cambodia but about once a year returned to the United States for family and business reasons.<sup>103</sup> Clark was convicted under 18 U.S.C. 2423(c) for traveling in foreign commerce and engaging in commercial sexual activity with children under the age of 18 in Cambodia.<sup>104</sup> Clark appealed, arguing among other things, that his conduct rested beyond the outer limits of the Foreign Commerce Clause. The Ninth Circuit held that “[t]he combination of Clark’s travel in foreign commerce and his conduct of an illicit commercial sex act in Cambodia shortly thereafter puts the statute squarely within Congress’s Foreign Commerce Clause authority. In reaching this conclusion, we view the Foreign Commerce Clause independently from its domestic brethren.”<sup>105</sup> A dissenting member of the panel objected that the Foreign Commerce Clause should not be read to permit Congress to regulate all commercial activities once an individual has engaged in international travel.<sup>106</sup>

### *United States v. Weingarten*

Weingarten, another American expatriate, sexually abused his daughter for years.<sup>107</sup> He was eventually convicted for transportation of a child with intent to engage in unlawful sexual activity in violation of 18 U.S.C. 2423(a) and for travel in foreign commerce with the intent to engage in unlawful sexual activity with a child in violation of 18 U.S.C. 2423(b).<sup>108</sup> A flight between Belgium and Israel formed the basis of one of the foreign commerce counts.<sup>109</sup> On appeal, Weingarten argued alternatively that (1) travel between two foreign countries without a nexus to the United States could not meet the statutory requirement of “travel in foreign commerce,” or (2) if the statute purported to do so, it exceeded congressional authority under the Foreign Commerce Clause.

The Second Circuit opted to construe the statute so that it did not apply to travel between foreign countries with no nexus to the United States.<sup>110</sup> Constitutional avoidance, however, seems to have played a role in the court’s election.<sup>111</sup>

<sup>103</sup> *United States v. Clark*, 435 F.3d 1100, 1103 (9<sup>th</sup> Cir. 2006).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1116. The court also explained that “forcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella’s glass slipper; nonetheless, there is a good argument that, as found by the district court, §2423(c) can also be viewed as a valid regulation of the ‘channels of commerce,’” *id.*

<sup>106</sup> *Id.* at 1119-120 (Ferguson, J., dissenting)(“ ... §2423(c) neither punishes the act of traveling in foreign commerce, or the wrongful use or impediment of use of the channels of foreign commerce. Rather, it punishes future conduct in a foreign country entirely divorced from the act of traveling except for the fact the travel occurs at some point prior to the regulated conduct.... The mere act of boarding an international flight, without more, is insufficient to bring all of the Clark’s downstream activities that involve an exchange of value within the ambit of Congress’s Foreign Commerce power. On some level, every act by a U.S. citizen abroad takes place subsequent to an international flight or some form of travel in foreign commerce. 18 U.S.C. 2423(c). This cannot mean that every act with a bare economic component that occurs downstream from travel is subject to regulation by the United States under its Foreign Commerce power, or the Commerce Clause will have been converted into a general grant of police power”).

<sup>107</sup> *United States v. Weingarten*, 632 F.3d 60, 62-3 (2d Cir. 2011).

<sup>108</sup> *Id.* at 61.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 61-2. The court also noted that the statute does apply to travel beginning in the United States, but involving multiple overseas stops and that its analysis would be different had the statute prohibited travel *affecting* foreign commerce rather than *in* foreign commerce, *id.* at 71.

<sup>111</sup> *Id.* at 70-1 (“We note, finally, that our determination that §2423(b) does not extend to travel occurring wholly between foreign nations and without any territorial nexus to the United States appropriately avoids the necessity of

### ***United States v. Pendleton***

Pendleton flew from New York to Germany where he sexually assaulted a child.<sup>112</sup> He was convicted of traveling in foreign commerce and engaging in unlawful sexual activity with a child in violation of 18 U.S.C. 2423(c).<sup>113</sup> He challenged the constitutional authority of Congress to rely on the Foreign Commerce Clause to enact a statute that punishes noncommercial overseas sexual activity.<sup>114</sup>

The Third Circuit disagreed. Although it declined the government's invitation to endorse the Ninth Circuit's *Clark* decision, it found it need not resolve the issue. The facts before it satisfied *Lopez*'s "channels of commerce," making it unnecessary to decide whether the Foreign Commerce Clause reaches areas not covered by the Interstate Commerce Clause's channels, instrumentalities, and affects standards. Congress enjoys constitutional authority to prevent the use of the channels of commerce for purposes of illicit sex tourism, the Third Circuit held.<sup>115</sup>

### **VAWA Reauthorization**

The Violence Against Women Reauthorization Act of 2013 amends Section 2423(c) to permit prosecution of American expatriates who engage in unlawful sexual conduct overseas without the need to establish travel in foreign commerce: "Any United States citizen or alien admitted for permanent residence who travels in foreign commerce *or resides either temporarily or permanently in foreign country*, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."<sup>116</sup>

## **Article I, Section 8, Clause 10**

The Congress shall have Power ... To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.

Clause 10 is said to contain three distinct components: one for piracy, one for felonies committed upon the high seas, and one for offenses against the law of nations.<sup>117</sup> The *Bellaizac-Hurtado* court's understanding of the Law of Nations Clause leaves Congress with little discretion to "define and punish." The *Dire* court's construction of the piracy statute leaves the scope of the Piracy Clause somewhat uncertain. On the other hand, once due process concerns are resolved, Congress seems to be thought to enjoy much greater legislative latitude under the High Seas

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addressing whether such an exercise of congressional power would comport with the Constitution").

<sup>112</sup> *United States v. Pendleton*, 658 F.3d 299, 301 (3d Cir. 2011).

<sup>113</sup> *Id.* at 301-302.

<sup>114</sup> *Id.* at 302.

<sup>115</sup> *Id.* at 311 (internal citations omitted) ("And just as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce to evade state registration requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce to abuse children.... In sum, because the jurisdictional element in §2423(c) has an 'express connection' to the channels of foreign commerce, we hold that it is a valid exercise of Congress's power under the Foreign Commerce Clause").

<sup>116</sup> Section 1211(b), P.L. 113-4, 127 Stat. 142 (2013), amending 18 U.S.C. 2433(c) (language of the amendment in italics).

<sup>117</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820); see also *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2011) ("The Supreme Court has interpreted that Clause to contain three distinct grants of power").

Clause, as evidenced by cases decided under the Maritime Drug Law Enforcement Act (MDLEA) and the Drug Trafficking Vessel Interdiction Act (DTVIA),

## Law of Nations

### *United States v. Bellaizac-Hurtado*

Panamanian authorities arrested Bellaizac-Hurtado and his co-defendants after they abandoned in Panamanian waters an unflagged vessel containing 760 kilograms of cocaine.<sup>118</sup> A federal grand jury subsequently indicted them under the Maritime Drug Law Enforcement Act (MDLEA) for possession of cocaine, with intent to distribute, aboard a vessel subject to United States jurisdiction.<sup>119</sup> They pleaded guilty, but reserved the right to appeal the questions of congressional power to authorize their convictions under the Piracy, High Seas, and Law of Nations Clause.<sup>120</sup> The court determined that congressional authority under the Law of Nations Clause did not extend to a prohibition of drug trafficking within the territorial waters of another nation.<sup>121</sup>

The court's analysis began with the proposition that Congress's authority to "define and punish ... Offenses against the Law of Nations" does not include the authority to define what constitutes an offense under the law of nations. "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress."<sup>122</sup> It then decided that an offense must be contrary to customary international law in order to constitute an offense against the law of nations.<sup>123</sup> Customary international law, the court said, is that law which is generally and consistently practiced by nations throughout the world out of a sense of legal obligation.<sup>124</sup>

Drug trafficking, the offense at issue, was not recognized as contrary to customary international law when the Law of Nations Clause was drafted nor has since acquired that status, the court stated.<sup>125</sup> Although most nations have endorsed treaties obligating them to suppress drug

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<sup>118</sup> *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1247-248 (11<sup>th</sup> Cir. 2012).

<sup>119</sup> *Id.* at 1248.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1258 ("Because drug trafficking is not a violation of customary international law, we held that Congress exceeded its power under the Offenses Clause, when it proscribed the defendants' conduct in the territorial waters of Panama"). See also *United States v. Carvajal*, \_\_\_ F.Supp.2d \_\_\_, \_\_\_ \*24 (D.D.C. Feb. 20, 2013) ("The United States has argued in its petition for rehearing en banc in *Bellaizac-Hurtado* in the Eleventh Circuit that Congress had the power to criminalize MDLEA offenses charged in that case under the Treaty Power").

<sup>122</sup> *Id.* at 1249, quoting, *United States v. Arjona*, 120 U.S. 479, 488 (1887).

<sup>123</sup> *Id.* at 1251 (some internal citations omitted) ("We and our sister circuits agree that the eighteenth-century phrase, the 'law of nations' is contemporary terms, means customary international law. And although the Supreme Court has never held that the 'law of nations' is synonymous with 'customary international law,' its decision *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), confirms that it is. See *id.* at 735 (evaluating whether the 'prohibition of arbitrary arrest has attained the status of binding customary law' to determine whether Alvarez could bring a claim under the Alien Tort Statute) (The Alien Tort Statute was enacted relatively soon after ratification of the Constitution).

<sup>124</sup> *Id.* at 1252 ("We agree with our sister circuits that customary international law is determined by examining state practice and opinio juris: 'Customary international law ... consists of two components. First, there must be a general and consistent practice of states.... Second, there must be a sense of legal obligation, or opinio juris sive necessitatis'").

<sup>125</sup> *Id.* at 1254-257.

trafficking, the court cited evidence that the practice in many nations belies any assertion that they feel compelled to do so out of a sense of legal obligation.<sup>126</sup>

The *Bellaizac-Hurtado* court had little Supreme Court jurisprudence upon which to build. Although not relevant for the court's analysis, the only Supreme Court decision directly on point suggests that Congress's power under the Law of Nations Clause may be slightly more robust in other contexts: "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof."<sup>127</sup>

## High Seas

The High Seas Clauses cases primarily arise out of the Maritime Drug Law Enforcement Act (MDLEA) and more recently out of the Drug Trafficking Vessel Interdiction Act (DTVIA). Early on, the lower federal appellate courts concluded that Congress's power "to define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations" vested it with authority to enact MDLEA.<sup>128</sup> Some also recognized a due process limitation on the courts' ability to try and punish MDLEA defendants.<sup>129</sup> The DTVIA cases continue this line of reasoning.

### The DTVIA Cases

#### *United States v. Ibarquen-Mosquera*

Ibarquen-Mosquera was convicted of operating an unflagged, semi-submersible vessel in international waters in violation of the Drug Trafficking Vessel Interdiction Act (DTVIA).<sup>130</sup> He argued unsuccessfully that DTVIA exceeded congressional authority under Article I, Section 8, and violated due process.<sup>131</sup>

The court dispensed with the first contention quickly by pointing to Congress's authority under the High Seas Clause.<sup>132</sup> Its sole remaining concern was any due process limitation on Congress's ability to reach foreign nationals traveling outside U.S. territorial waters.<sup>133</sup> The lower federal appellate courts generally conclude that the demands of due process have been satisfied, if the assertion of jurisdiction is consistent with international law.<sup>134</sup> For this, the court cited its

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<sup>126</sup> *Id.* at 1255 ("The 2011 Report of the [International Narcotic Control] Board found that '[c]orruption and limited law enforcement capacity in Central America and the Caribbean have facilitated the use of smuggling channels and drug trafficking activities. The Board also has expressed concern about corruption and lack of progress in reducing illicit opium poppy cultivation in Afghanistan. The practice of these specially affected States evidences that drug trafficking is not yet considered a violation of customary international law").

<sup>127</sup> *United States v. Arjona*, 120 U.S. 479, 484 (1887) (upholding congressional authority to outlaw counterfeiting foreign securities in the United States, under the Law of Nations Clause, *inter alia*).

<sup>128</sup> E.g., *United States v. Davis*, 905 F.3d 245, 248 (9<sup>th</sup> Cir. 1990).

<sup>129</sup> E.g., *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256 (9<sup>th</sup> Cir. 1998) ("Before a United States court may entertain a prosecution for violation of the Act, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary and fundamentally unfair").

<sup>130</sup> *United States v. Ibarquen-Mosquera*, 634 F.3d 1370, 1376-377 (11<sup>th</sup> Cir. 2011).

<sup>131</sup> *Id.* at 1377-378.

<sup>132</sup> *Id.* at 1378.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1378-379.

precedents and those of some of the other circuits which have consistently held that unflagged, stateless vessels enjoy no right to freely travel the high seas.<sup>135</sup>

### ***United States v. Saac***

Saac was likewise convicted under DTVIA, and he too challenged its constitutionality.<sup>136</sup> The court referred to the High Seas Clause and noted that the Clause did not explicitly confine its scope to either U.S. territorial waters or U.S. citizens.<sup>137</sup> The court disposed of the due process argument with the observation that the DTVIA is consistent with the due process satisfying principles of international law that allow a country to enact laws against universally condemned misconduct (e.g., drug trafficking), and against threats to its national security (e.g., smuggling).<sup>138</sup>

### ***United States v. Cardales-Luna***

Cardales-Luna was convicted under MDLEA after U.S. Coast Guard officials interdicted his Bolivian-registered vessel on the high seas and discovered that it contained 400 kilograms of cocaine.<sup>139</sup> Bolivian authorities consented to the application of MDLEA aboard the vessel,<sup>140</sup> thereby satisfying MDLEA's "vessel within the jurisdiction of the United States" requirement.<sup>141</sup> The court did not address the issue of Congress's legislative authority, since neither Cardales-Luna nor the government raised the issue.<sup>142</sup>

A dissenting member of the panel, however, would have done so. Judge Torruella contended that "the application to MDLEA to Appellant [constitutes an] ultra vires extension of [Congress'] Article I legislative powers to foreign territory, as applied to persons and/or activities that have no nexus with the United States." Moreover, he suggested that "the question of Congress exceeding its Article I power under the facts of this [MDLEA] case is structural in nature and [therefore] cannot be waived by the individual concerned or the nation of which he is a citizen or on whose vessel he is apprehended."<sup>143</sup>

In the course of his analysis, Judge Torruella examined and rejected several possible sources of congressional authority. He found power under the Piracy, High Seas, and Law of Nations Clause wanting because he understood the Clause confined to piracy, slave trading, and offenses contrary to customary international law.<sup>144</sup> Implementation of the maritime jurisdiction of the federal courts demands an American vessel.<sup>145</sup> Implementation of the Treaty Clause requires a treaty.<sup>146</sup>

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<sup>135</sup> *Id.* at 1379.

<sup>136</sup> *United States v. Saac*, 632 F.3d 1203, 1206-207 (11<sup>th</sup> Cir. 2011).

<sup>137</sup> *Id.* at 1209.

<sup>138</sup> *Id.* at 1211.

<sup>139</sup> *United States v. Cardales-Luna*, 632 F.3d 731, 732 (1<sup>st</sup> Cir. 2011).

<sup>140</sup> *Id.* at 736.

<sup>141</sup> 46 U.S.C. 70503(a) ("An individual may not knowingly ... possess with intent to ... distribute, a controlled substance on board ... a vessel subject to the jurisdiction of the United States"); 70502(c)(1) ("In this chapter, the term 'vessel subject to the jurisdiction of the United States' includes ... (C) a vessel registered in a foreign nation if that nation has consented or waived objection to enforcement of United States law by the United States ...").

<sup>142</sup> *Id.* at 737-38.

<sup>143</sup> *Id.* at 742-43.

<sup>144</sup> *Id.* at 743-47.

<sup>145</sup> *Id.* at 747-48.

<sup>146</sup> *Id.* at 748-49 ("No court decision dealing with MDLEA refers to any treaty obligation as the source of Congress's Article I authority").

The Foreign Commerce Clause demands a “demonstrable and direct nexus to the United States.”<sup>147</sup>

## Piracy

### *United States v. Dire*

Dire was convicted of piracy under 18 U.S.C. 1651 following his participation in an armed attack on a U.S. Navy frigate that he believed to be a merchant ship.<sup>148</sup> The Fourth Circuit acknowledged that Congress has the constitutional authority to define and punish piracy.<sup>149</sup> Section 1651 outlaws piracy “as defined by the law of nations.” This, the court concluded, means piracy as understood by customary international law at the time of the offense.<sup>150</sup>

## Spending Clause

The Congress shall have Power To lay and collect Taxes ... to provide ... for the general Welfare of the United States.<sup>151</sup>

The Supreme Court has said in the past that Congress’s exercise of the Spending Clause is subject to certain limitations: “[F]irst[,] ... the exercise of the spending power must be in pursuit of ‘the general welfare.’ ... Second, ... if Congress desires to condition the States’ receipt of federal funds, it must do so unambiguously enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation. Third, ... conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.... Finally, ... other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”<sup>152</sup> *National Federation* brings home the point that Congress may not use its spending power to coerce state participation in a federal program.<sup>153</sup>

### *National Federation of Independent Business v. Sebelius*

The Patient Protection and Affordable Care Act purported to condition the continued receipt of federal Medicaid funds upon a state’s participation in an expanded Medicaid program. Seven Justices of the Court—three from the majority and four dissenters—felt that was more than the Spending Clause conveys.<sup>154</sup> Coercion doomed the effort. Congress may employ the power of the purse to encourage the states to participate in a federal program; it may not use it to compel them

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<sup>147</sup> *Id.* at 750.

<sup>148</sup> *United States v. Dire*, 680 F.3d 446, 449 (4<sup>th</sup> Cir. 2012).

<sup>149</sup> *Id.* at 452.

<sup>150</sup> *Id.* at 469.

<sup>151</sup> U.S. Const. Art. I, §8, cl. 1.

<sup>152</sup> *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987)(upholding a statute which permitted withholding a percentage of the otherwise available federal highway funds from a state that allowed the possession of alcoholic beverages by individuals under 21 years of age).

<sup>153</sup> *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

<sup>154</sup> *Id.* at 2601-607 (2012)(Roberts, Ch.J., with Breyer and Kagan, JJ); *id.* at 2666-667 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting)(“Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional”). Other than the dissenters, the Members of the Court determined that the appropriate remedy was to bar withholding funds for non-participation, *id.* at 2607 (Roberts, Ch.J., with Breyer and Kagan, JJ.); *id.* at 2630-631 (Ginsburg with Sotomayor, JJ. concurring in the judgment).



to do so. The dissenters pointed out that “the legitimacy of Congress’ power to legislate under the spending power ... rests on whether the State *voluntarily* and knowing accepts’ [a condition].... Congress effectively engages in [] impermissible compulsion when state participation in a federal spending program is coerced, so that the States’ choice whether to enact or administer a federal regulatory program is rendered illusory.”<sup>155</sup>

Chief Justice Roberts, in the portion of his opinion joined by Justices Breyer and Kagan, made the same point.<sup>156</sup> Neither he nor the dissenters found it necessary to mark precisely where persuasion becomes coercion. Wherever the line, the Medicaid expansion was beyond it.<sup>157</sup>

Again, *National Federation* did not involve a criminal statute, but the scope of the power defines the scope of power to enact criminal laws in its implementation.

## Military Clauses

The Congress shall have Power ... To declare War ... To raise and support Armies ... To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces ... To provide for organizing, arming, and disciplining the Militia....<sup>158</sup>

### *United States v. Brehm*

Brehm, a foreign national and Department of Defense (DOD) contractor, assaulted another foreign DOD contractor at Kandahar Airfield in Afghanistan.<sup>159</sup> He was brought to the United States and convicted of assault resulting in serious bodily injury under the Military Extraterritorial Jurisdiction Act (MEJA).<sup>160</sup> Brehm argued that the Constitution gave Congress no authority to outlaw altercations between foreign nationals outside the United States and that due process precluded any effort to do so.<sup>161</sup> The Fourth Circuit concluded that the Military Clauses supplemented by the Necessary and Proper Clause supplies all the constitutional authority

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<sup>155</sup> *Id.* at 2660 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting), quoting, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>156</sup> *Id.* at 2602 (Roberts, Ch.J., with Breyer and Kagan, JJ.) (internal citations and quotation marks omitted) (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when pressure turns into compulsion, the legislation runs contrary to our system of federalism. The Constitution simply does not give Congress the authority to require the States to regulate”).

<sup>157</sup> *Id.* at 2606 (“The Court in *Steward Machine* did not attempt to fix the outermost line where persuasion gives way to coercion.... We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it”); *id.* at 2660 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (“Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and court should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule”).

<sup>158</sup> U.S. Const. Art. I, §8, cls. 11, 12, 13, 14, 16.

<sup>159</sup> *United States v. Brehm*, 691 F.3d 547, 549 (4<sup>th</sup> Cir. 2012).

<sup>160</sup> *Id.* MEJA, 18 U.S.C. 3261-3267, treats certain offenses committed overseas by certain members of the Armed Forces or DOD contractors as if they were committed within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 3261.

<sup>161</sup> *United States v. Brehm*, 691 F.3d at 550.



required.<sup>162</sup> As for due process limitations, the circumstances and the nature of his conduct afforded Brehm fair notice that his dangerous assault exposed him to prosecution.<sup>163</sup>

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<sup>162</sup> *Id.* at 551 (some internal citations omitted) (“The enumerated powers granted Congress by Article I, Section 8 of the Constitution are of sufficient reach to encompass any of the scenarios articulated about, including Brehm’s. Of particular relevance here is Congress’s express authority to ‘raise and support Armies.’ More generally, Congress is entitled ‘make all Laws which shall be necessary and proper’ to adequately support our armed forces”).

<sup>163</sup> *Id.* at 552-54.